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Planner: J. Adema

TO:	CHAIR AND MEMBERS PLANNING & ENVIRONMENT COMMITTEE
FROM:	JOHN M. FLEMING MANAGING DIRECTOR, PLANNING AND CITY PLANNER
SUBJECT:	ONTARIO MUNICIPAL BOARD REVIEW MEETING ON MONDAY, AUGUST 22, 2016

RECOMMENDATION

That, on the recommendation of the Managing Director, Planning and City Planner, the following actions be taken:

- i. This report **BE RECEIVED** for information;
- ii. This report **BE FORWARDED** to the Ministry of Municipal Affairs and the Attorney General in response to their initial consultation regarding the review of the scope and effectiveness of the Ontario Municipal Board **IT BEING NOTED THAT** at this time the City’s primary areas of concern can be summarized as:
 - 1. The scope of matters that can be appealed to the OMB is too broad;
 - 2. The OMB does not place sufficient weight on Municipal Council’s decisions (arrived at by Council as an elected body and with substantial public consultation);
 - 3. An emphasis on alternative dispute resolution that includes limited public consultation, following Municipal Council’s decision, has the potential to undermine the province’s rigorous requirements for public participation throughout the planning process prior to appeal and, thus, weaken meaningful public participation in establishing a final local planning decision; and
 - 4. The OMB should be more accountable for implementing existing legislation in its hearings and practices relating to such matters as not allowing for new information to be introduced at OMB hearings that was not clearly in front of the Public and Council at the time of Municipal Council’s decision.
- iii. The Ministry of Municipal Affairs and the Attorney General **BE ADVISED** that the City of London will submit further comments regarding this review, following the province’s release of a discussion paper on the subject.

BACKGROUND INFORMATION

The Ontario Ministry of Municipal Affairs and Ministry of the Attorney General have initiated a review of the scope and effectiveness of the Ontario Municipal Board (OMB) for the purpose of developing recommendations to improve how the OMB works within the broader system of land use planning. This review is in its early stages, and no information has been provided to date regarding what specific changes are being contemplated for the OMB.

The Province has indicated that a consultation paper will be prepared and released in

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fall, 2016. In the meantime, however, the Province has asked for preliminary comments on the following topics as it relates to the OMB:

- Jurisdiction and powers
- Meaningful citizen participation and local perspective
- Clear/predictable decision making
- Hearing procedures and practices
- Alternative dispute resolution
- Timely processes and decision making

In order to ensure that the City of London’s interests are considered in this OMB review it is important to be involved at all stages of the review process. As such, the following report has been prepared as a first series of comments to the province related to the current OMB practices that could be updated to improve the planning process.

It is anticipated that further comments will be provided in response to the consultation paper to be released by the Province this fall. Information will be reported to the Planning & Environment Committee at that time. Based upon our review of the topics identified by the province in its request for feedback and our experience with the OMB, Our comments at this time are currently limited to four areas of concern, which include:

1. The scope of what can be appealed to the Ontario Municipal Board;
2. The current practice of *de novo* OMB hearings and the weight of Municipal Council’s local planning decisions on final OMB decisions;
3. The potential to undermine public participation through current and proposed appeal processes;
4. Accountability for the Board to follow existing legislation through its hearings and practices.

SCOPE OF APPEALS

The first concern is the scope of what can be appealed to the OMB and the impact that this has on the planning process as it applies to city-wide or area-wide policies, particularly in relation to new plans or policies that are not necessarily tied to individual sites. The Province may wish to consider that appeals of city-wide or area-wide policies should be limited to site specific concerns or, where an appellant has concerns regarding a policy with wider, city-wide implications, the policy should only be subject to appeal as it applies to those specific lands.

When City staff and Council prepare and approve policies, it is done from the perspective of what is in the public interest, good planning, and in line with the vision, values, and planning directions given in our various planning documents. The basis of many appeals to city-wide or area-wide policies are often more related to the impact that these policies may have on the development potential associated with the individual parcel, and not from the perspective of the public interest or good land use planning. There should be a shift of burden or onus onto an Appellant to demonstrate that there is a land use planning issue with the decision of Council in order to require an appeal to the Ontario Municipal Board. The Province may consider “screening” criteria to be considered by the Board when an appeal is made to determine if, in fact, there is a land use matter to be adjudicated.

Given these concerns, we feel that the planning process could be improved by limiting the scope of OMB appeals to site-specific concerns.

Currently, appeals to decisions regarding minor variances and consents may be made to a local appeal body. The Province may wish to consider requiring that these matters

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be dealt with by local appeal bodies, rather than permitting this. Explicitly removing appeals of these matters to the OMB would provide relief to the Board, and allow it to focus on more substantive land use planning matters.

CONSIDERATION AND WIEGHT PLACED ON COUNCIL DECISIONS

OMB Hearings are decided on the evidence presented, having regard for the decision of Municipal Council. The standard of “having regard for” any decision of Council is not an appropriate standard. Council’s decision should be considered to be the standard or starting point for any Hearing, and the burden of evidence should be placed on an appellant to demonstrate why Council’s decision is in some way incorrect or contrary to good planning principles.

The OMB practice of conducting *de novo* hearings is problematic, as it does not adequately factor in the results of the planning process and public engagement that must be completed prior to Council’s decision under the legislative requirements in the *Planning Act*. The OMB needs to recognize that a democratic process has already taken place in the lead-up to any council decision, and to consider all of the evidence anew does give due respect to the outcomes of this process.

It is our opinion that the decisions made by Council on planning matters should be accorded more consideration and weight in any subsequent Hearing. Hearings should begin with an understanding of Council’s decision, and the Appellant should be required to demonstrate how Council’s decision is not consistent with a planning policy or principle such that it is not correct in order for Council’s decision to be overturned. OMB decisions should be articulated in terms of whether they confirm, alter, or overturn a Council decision so as to clearly link the municipal planning process to the OMB decision.

By shifting the burden of evidence as described above, the number of appeals could be reduced as Appellants would be required to provide appropriate planning evidence to support a position that a Council decision was not correct. This could also help to more appropriately scope some Hearings to the specific issues that formed the basis of a Council decision.

PUBLIC PARTICIPATION IN THE OMB PROCESS

The planning process, as required by the *Planning Act*, is an open and transparent process in which there are many opportunities to hear and consider the concerns of the public. The public is invited into the beginning of the process with the Notice of Application, and is able to participate throughout the full planning process, including making oral and written submissions to the Council in advance of Council’s decision on a planning application.

The role of the public at an OMB Hearing is much different. At the OMB, evidence is given by qualified professionals, and the Board renders its decision based upon the evidence that it prefers from what it has received from those qualified professionals. While the public may participate in any Hearing, the Board’s decisions are primarily based on the professional evidence that it hears. The submissions of the public are accorded much less weight than the professional evidence that it receives, and this is not widely understood by the public, including those who participate in the Hearing.

We feel that there needs to be a greater emphasis placed on public participation throughout the whole planning process, including at hearings before the OMB. This means that information provided to Council and staff during the consideration of an application should also be provided to the OMB to be included in its consideration of an appeal.

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With respect to public participation in the ADR process, we have similar concerns. For example, how will public input be received through an ADR process? If a decision of Council is referred to an ADR process, either as an alternative to the OMB, or as a requirement prior to an OMB Hearing, how will the public be heard or represented? How will the public's interests be presented in an ADR process, and would individual members of the public be able to make submissions in that process like they can now through both the planning application review process or participation at an OMB Hearing? These are some of the matters to be considered as part of this review.

ACCOUNTABILITY FOR THE OMB TO FOLLOW CURRENT LEGISLATION

Some of the issues that have arisen with the OMB is its lack of adherence to existing legislative requirements. For instance, there is an issue currently with new information being presented at a Hearing that was not included when Council considered the application. This and other instances where legislation has not been strictly followed shows a lack of consideration to the democratic process that preceded the OMB hearing.

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August 15, 2016

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